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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-769

ROBERT M. KNUTH, *et al.*, *Petitioners*,

v.

ERIE-CRAWFORD DAIRY COOPERATIVE ASSOCIATION, WILLIAM COLTERYAHN & SONS, INC., KLEIN DAIRY, LINGERLIGHT DAIRY COMPANY, SCHNEIDER'S DAIRY, INC., SNEE DAIRY COMPANY, ERIE DAIRY LAND, INC., GOLDEN CROWN DAIRY, SCHRUER'S DAIRY, YAPLE'S DAIRY, INC., GOLDEN GLOW DAIRY, SEALTEST FOODS, DIVISION OF NATIONAL DAIRY PRODUCTS CORPORATION, HOWARD YOST, JOHN HANAS, RUSSELL RAYBUCK, MILTON CULBERTSON, DONALD TRISCUIT, RAYMOND BOYD, CALVIN HENRY, ROY BLACK, LOREN MITCHELL, CHARLES SPAID.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Appendix A, pp. 1a-28a, *infra*) is reported at —— F.2d ——. The earlier opinion of the Court of Appeals which reversed the dismissal of petitioner's complaint (Appendix C, pp. 32a-49a, *infra*) is reported at 395 F.2d 420. The opinion of the District Court filed April 15, 1971 (Appendix D, pp. 50a-80a, *infra*) is reported at 326 F.Supp. 48.

JURISDICTION

The opinion and judgment of the Court of Appeals was filed on April 17, 1972. A timely petition for rehearing *in banc* was denied on July 28, 1972 (Appendix B, p. 31a, *infra*). On October 11, 1972, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including November 25, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a "combination" or "conspiracy" within the meaning of the Sherman Act is shown when agents of a milk marketing cooperative and dairies secretly agree to participate in an admittedly illegal rebate scheme to undercut state-regulated minimum prices for milk to be paid the farmers who are members of the cooperative, even though there is no direct evidence of agreement among the dairies as to prices.

2. Whether the court of appeals violated the liberal-pleading principle of Rule 15(b) of the Federal Rules of Civil Procedure by reversing a jury verdict for the plaintiffs on the ground that the elements of "conversion" under Pennsylvania law were not satisfied although the proof would justify recovery under a breach-of-contract theory.

3. Whether the courts below erroneously held that the applicable statute of limitations barred recovery for a period when the defendants were concealing the unlawful rebates.

STATEMENT

Between 1957 and 1965, the Erie-Crawford Dairy Cooperative Association ("the Cooperative") sold milk to dairies in Pennsylvania under arrangements

whereby it rebated to the buyers a certain amount of the specified purchase price. This was done, according to the stipulated facts in the district court, because the sale of milk within Pennsylvania was regulated, at that time, by the Pennsylvania Milk Control Commission pursuant to Pennsylvania law.[1] The Commission specified the minimum prices which Pennsylvania "handlers" were obliged to pay to Pennsylvania "producers" for milk received within the State. Fearing that its customers would purchase cheaper milk produced in New York and Ohio, the Cooperative offered to Pennsylvania dairies an arrangement whereby the buyers initially paid the full amount required by State law and were, thereafter, secretly sent checks which reduced their price pursuant to an agreed formula. As a consequence, the farmers who marketed their milk through the Cooperative received less than they were entitled to under the minimum-price schedule fixed by the State Commission (Pet. App. 418-424a).[2]

This action was instituted in the United States District Court for the Western District of Pennslyvania in December 1965 to recover, from the officers and directors of the Cooperative and from the dairies who had purchased the milk at lower prices, the full amount of the rebates given by the Cooperative during the nine-year period. The named plaintiff owned a dairy farm in Pennsylvania and sold his milk through the Cooperative, and this suit was brought as a class action on behalf of all farmers similarly situated. Of that

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[1] 31 Purdon's Pa. Stat. Ann. §§ 700j-101 *et seq.* (1958 ed.)

[2] "Pet. App." refers to the Appendix for Appellant filed in the Court of Appeals. "Res. App." refers to the two-volume Joint Appendix for Appellees filed in that court.

group, 290 have elected to be represented in this class action.

The complaint charged, *inter alia,* that the arrangements between the Cooperative's agents and the dairies violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and that the rebates constituted fraudulent conversion of money belonging to the plaintiffs. District Judge Marsh—to whom the case was initially assigned—dismissed the complaint with prejudice in March 1967. The Court of Appeals for the Third Circuit reversed that decision in May 1968 and remanded the case for trial. 395 F.2d 420 (pp. 32a-49a, *infra*).

The case was reassigned to District Judge Weis, before whom a jury trial was held between September 16 and October 13, 1970. At the conclusion of the plaintiff's case, the judge dismissed the Sherman Act claim on the ground that "there was no evidence that any of the dairies had agreed among themselves to set prices at which they would purchase milk from Erie-Crawford" and that "there was no showing of any restraint upon interstate commerce" (p. 56a, *infra*). The conversion claim was submitted to the jury, which found for the plaintiffs against all defendants. (A copy of the jury's answers to special interrogatories appears as Appendix E, pp. 81a-83a, *infra.*)

The principal defense asserted at trial was that the rebates—called "price adjustments" by the defense—were necessary in order to enable the Cooperative to sell the plaintiffs' milk. It was stipulated that New York and Ohio milk was available at prices below the "Class I" price set by the Pennsylvania Commission, and the defendants maintained that the Cooperative's customers would have purchased out-of-state milk if the admittedly unlawful reductions had not been given.

The issue was submitted to the jury under the following instructions (Resp. App. 928-930b):

> The defendants have presented evidence in this case which they contend shows that the plaintiffs actually did not suffer real damages in the amount of the rebates, because were it not for the arrangements made by Erie-Crawford to sell the milk at the price which it was able to obtain, the plaintiffs would not have been able to sell their milk at any better price, and, in fact, would have had to sell at a lower price.
>
> You have heard all of the testimony about market conditions in this general area of the country; the prices paid by other organizations for the milk which they received from producers; and it is for you to decide if the plaintiffs sustained actual loss, whether it was in the full amount of the rebates, whether it was a smaller sum, or whether it was only nominal damages of one dollar.
>
> If you decide that less than the full amount should be awarded to the plaintiffs, you will be asked on the interrogatories to indicate what percentage of the rebates amounted to the actual loss of the plaintiffs. We are asking you to use percentages rather than dollars because of complicating factors of computation which will be involved.
>
> In order to allow a reduction of damages, you must find that even if the plaintiffs had been aware of the conversions, they would not have been able to do better for themselves than was done in selling the milk at the prices obtained by Erie-Crawford.
>
> Should you find, however, that if the plaintiffs had been informed of the transactions by the defendants that they would have been able to take other steps to secure higher prices for their milk,

then, to that extent the defendants would not be entitled to a reduction in damages. In other words, if there was a concealment by the defendants which prevented the plaintiffs from taking steps to secure better prices for their milk, then a reduction in damages to that extent would not be proper.

The plaintiffs, however, deny that the best possible price was secured under the circumstances, and they contend that other alternatives were available so the farmers could receive the lawful price. You will recall the testimony on the other courses of action suggested by the defendants in their case. I should say, too, of course, that the plaintiffs contend that there should be no reduction in the amount of damages. This will be one of the questions you will have to decide.

The jury's answers to interrogatories directed to this issue were as follows (Pet. App. 431a):

5. Did the conversion of plaintiff's property by the defendants result in only nominal ($1.00) damages to the plaintiffs?

YES NO X

If your answer is "NO", please answer the following interrogatories:

6. Are the defendants entitled to a reduction in the damages claimed by the plaintiffs?

YES NO X

7. If the answer is "YES", indicate what percentage of reduction the defendants are entitled to:

After return of the jury's verdict, the district judge granted motions for judgment notwithstanding the verdict by the individual directors of the Cooperative and

vacated the verdict insofar as it permitted a recovery for damage sustained before May 31, 1960—*i.e.*, beyond the six-year limitations period provided by Pennsylvania law. The district judge also certified the case—prior to computation of damages—for interlocutory appeal under 28 U.S.C. § 1292(b).

The court of appeals concluded that the plaintiffs' Sherman Act claim was properly dismissed because "there is no evidence of any horizontal activity among any of the defendant handlers looking toward boycotting or toward price fixing on any level" (p. 8a *infra*), and because "the handlers did not act in concert for any purpose" (p. 9a, *infra*). The Court rejected the contention that each rebating agreement between the Cooperative and a dairy violated the Sherman Act by asserting that "an individual price rebate arrangement" was not a *per se* violation of the Sherman Act (pp. 10a-11a, *infra*).

The court then reversed the judgment for the plaintiffs on the conversion count on the ground that the farmers had no "title" to the money received by the Cooperative, but held only a "contract right to be paid by the Cooperative a sum of money . . ." (p. 15a, *infra*). It also sustained the trial court's dismissal of the claim against the individual directors and its ruling that the statute of limitations had not been tolled (pp. 20a-22a, *infra*).

REASONS FOR GRANTING THE WRIT

1. The record in this case showed a secret scheme between agents of the Cooperative on one side and handlers of milk on the other to undercut minimum prices established by State law to be paid Pennsylvania milk farmers by rebating a portion of the price paid

without notice to the milk farmers. Despite evidence of knowledge among the handlers of participation in the rebate scheme (which was illegal under state law) by other handlers, both lower courts held that plaintiffs failed to show the requisite "combination" or "conspiracy" because of the absence of proof of *agreement* among the handler concertedly to seek rebates. These rulings conflict with at least three lines of decisions of this Court defining the evidentiary requirements for proof of antitrust conspiracies. These rulings also set a standard for evidentiary proof of conspiracy which—in the context of a milk-marketing cooperative constituting an economic monopoly of the selling function and committed to an illegal course of conduct—is entirely unrealistic and invites such cooperatives to exceed the limited antitrust immunity they are granted under the Capper-Volstead Act, 7 U.S.C. § 291. See *Maryland and Virginia Milk Producers Ass'n.* v. *United States*, 362 U.S. 450 (1960).

(*a*) ***The courts below overlooked and misapplied binding decisions of this Court concerning the proof necessary to establish a "combination" or "conspiracy" within the meaning of Section 1 of the Sherman Act.***—Both the district court and the court of appeals erroneously concluded that the plaintiffs' antitrust claim depended on proof that the handlers of milk—*i.e.*, those who bought from the Cooperative at the illegally low prices—had agreed *among themselves* or taken some concerted action *inter sese* to secure rebates from the Cooperative. That conclusion—which was the principal basis for the dismissal of the plaintiffs' claim in the trial court and the affirmance of that dismissal by the court of appeals—conflicted with three lines of decisions of this Court:

(i) In *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), this Court held that the "combination" or "conspiracy" prerequisite of the Sherman Act is satisfied by proof of single agreement between two parties to do competitive harm to a third, even if one of the two parties is lawfully permitted to act unilaterally to harm the complainant. The agreement shown by this record between the Cooperative and its agents on one hand and each of the handlers on the other satisfied the standard set by the *Albrecht* case. For the necessary effect of the rebating arrangement which the Cooperative entered into with each handler was to harm the dairy farmers who are plaintiffs in this action by returning to them lower receipts than those to which they were lawfully entitled. There was, in other words, no need under the federal antitrust laws for the plaintiffs to prove that the handlers had not acted independently. Even if their agreements with the Cooperative were, as the court of appeals said, "individual sales contracts, negotiated at arm's length without knowledge on the part of the purchasers of the prices being charged others similarly situated" (pp. 9a-10a, *infra*), such contracts violated Section 1 of the Sherman Act if they unlawfully caused competitive injury to the plaintiffs.[3]

[3] The court of appeals' misunderstanding of the plaintiffs' claim emerges clearly from its ultimate conclusion that the case of *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969), resolves the challenge to the rebating practice (p. 11a, *infra*). These plaintiffs were not contending, as was the plaintiff in *Checker Motors*, that a *competitor's* rebating practice was restraining trade; obviously, such a practice usually is no more than "an advertising expedient." 405 F.2d at 322. The claim here is that the rebates were given by a party which was ostensibly acting *on behalf* of the plaintiffs, and the direct effect of such rebates is plainly to remove money from the plaintiffs' pockets and

The competitive harm caused the plaintiffs is manifest from the record. The Pennsylvania Commission established *minimum* prices for milk based upon its familiarity with the local industry and the needs of the local farmers. When an agent of the Cooperative and a handler entered into an agreement to undercut this minimum price with secret rebates, they were jeopardizing a producing farmer's ability to compete in the future by illegally reducing the profit which he was lawfully entitled to receive on his milk.

It is no answer to this contention to imply, as the courts below did (pp. 16a, 55a, 58a, *infra*), that the Cooperatives' rebating practice benefited the farmers because they would otherwise not have been able to compete with out-of-state milk prices. The plaintiffs maintained during trial that other profitable options would have been open to them if they had known they were not receiving the full legal price for their milk and that the Cooperative's officers were acting in the selfish interest of the Cooperative and not for the benefit of the farmers (*e.g.*, Pet. App. 72a-74a). And that issue—whether the Cooperative's rebate practices really helped the farmers—was submitted to the jury in Interrogatories 5, 6 and 7 (see p. 6, *supra* and pp. 81a-82a, *infra*). By its finding, the jury squarely rejected the factual argument that no competitive injury resulted from the agreement to sell at lower-than-legal-minimum prices.

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thereby hinder their ability to make profits and survive. Obviously a competitor's practice of granting rebates may simply be part of an overall, unilaterally imposed pricing structure. But the joint acts of those who are engaged in marketing and distributing a product, if carried out to the competitive harm of the producer cannot be similarly justified.

(ii) The courts below also erred in failing to apply this Court's decisions which have brought within the reach of the Sherman Act "consciously parallel" conduct by competitors which has anticompetitive effects. In *Interstate Circuit, Inc.* v. *United States,* 306 U.S. 208, 221-227 (1939), and in *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 146-147 (1948), motion-picture distributors were found to have acted in concert in violation of the Sherman Act even in the absence of direct testimony of their agreement. This Court held in the *Interstate Circuit* case that "[i]t was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." 306 U.S. at 226.

In this case, as well, "concerted action" was obviously "contemplated." The agents of the Cooperative would hardly have entered into so blatantly illegal a scheme with only one handler, and it is unlikely that any single handler would have agreed to take illegal rebates if he had not been fortified with the knowledge that his competitors were subjecting themselves to the same risk. Indeed, as part of the defense case, the handlers admitted as much. The first defense witness, the purchaser for Reick's Dairy (Sealtest) between 1957 and 1965, testified as follows on direct examination (Resp. App. 670b):

> Q. Do you have any knowledge as to whether or not any other dairy got any other price adjustments or rebates?
>
> A. We would have assumed, even in those times, that some of them must have been getting some adjustments or they would have gone elsewhere for their supply of milk.

The courts below erred in assuming that a violation of the Sherman Act required knowledge by any handler of the particular price arrangement made with his competitor (p. 8a, *infra*). The "consciously parallel" course of conduct in this case consisted of the understanding by the handlers who were receiving rebates that others similarly situated were engaging in like illegal conduct, thereby depriving the farmers of the proper return for their milk. Whether one handler was receiving more or less in the way of secret rebates than his competitor was not essential to the overall scheme. Here, as in *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969), it is not uniformity of prices that is charged but a conspiracy generally to undercut the price that the plaintiffs were entitled to receive.

This cooperative action on the part of handlers had the effect of driving the "blend price" paid to the Cooperative's farmers down to a point that, on occasion, fell *below* the New York and Ohio prices. (See Resp. App. 998b, for the years 1963 to 1965.) More importantly, however, it delayed by many years the institution of a regional *federal* marketing order, which did not come into effect until after public disclosure of the rebating practice in 1965.[4] The handlers plainly benefited from the chaotic condition of milk marketing in Pennsylvania and Ohio, and their cooperation in secret arrangements to undercut the prices that Pennsylvania farmers were entitled to (and would have re-

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[4] Although a federal marketing order was first sought in 1950 (Pet. App. 123a-124a), none was promulgated until after 1965. There is presently a federal order covering milk in the "Eastern Ohio-Western Pennsylvania Marketing Area." 7 CFR, Part 1036 (1971).

ceived, according to the jury's verdict, if the State law had been adhered to) was a combination to restrain trade in the sale of fresh milk in the Pennsylvania area.[5]

(iii) The courts below also overlooked the line of decisions defining "conspiracy" for the more stringent purposes of the Federal Criminal Code which followed this Court's decision in *Blumenthal* v. *United States*, 332 U.S. 539 (1947). The Court held in *Blumenthal* that a "wheel conspiracy" in which a single central figure or group carried out a "common plan" through a number of co-conspirators came within 18 U.S.C. § 371. Even if each of the co-conspirators did not know who else was in the scheme or "exactly the parts they were playing in carrying out the common design" (332 U.S. at 558), all were held to be coventurers in a single conspiracy. Here, as in *Blumenthal*, each of the handlers "knew or must have known" *(ibid)* that other dairies were participating with the Cooperative in unlawfully reducing the receipts of the farmers below the State-prescribed minimum. And all were interested in preserving the arrangement so that it would not be necessary to take the cumbersome step of importing out-of-state milk and to prevent the formulation of a federal marketing order. In these circum-

[5] The effect of the defendants' illegal restraint was on the interstate shipment of milk from Ohio and New York into Pennsylvania and from the plaintiffs' farms to out-of-state locations. If the Cooperative had not improperly sold the plaintiffs' milk at unlawfully low prices, that milk might have been sold to customers outside Pennsylvania, and the Cooperative's customers might have bought out-of-state milk. Consequently, even though the restraint may have arisen in the course of intrastate activities (sales by Pennsylvania farmers to Pennsylvania dairies), it had a substantial effect on interstate commerce. *E.g.*, *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 233-235 (1948).

stances, the participation of all the handlers satisfied the "conspiracy" requirement of the Sherman Act.

We emphasize, in this regard, that this case does *not* involve parallel *lawful* action, such as might be justified by the defendants for individualized business reasons. Rather, all the defendants engaged in what the court below characterized as "methods or subterfuges for avoiding" the prices set by Pennsylvania law (p. 8a, *infra*), and their conduct was admittedly illegal. On this record—as surely as on the record in *American Tobacco Co.* v. *United States,* 328 U.S. 781 (1946)—the proper inference which was compelled by the evidence (or which, at the very least, the jury should have been permitted to draw) was that "the conspirators had a unity of purpose on a common design and understanding, or a meeting of minds in an unlawful arrangement . . ." 328 U.S. at 809.

(b) *The decision of the court of appeals conflicts with a decision of the Eighth Circuit (per Blackmun, J.)*—In *Sanitary Milk Producers* v. *Bergjans Farm Dairy, Inc.,* 368 F.2d 679 (8th Cir. 1966), the Court of Appeals for the Eighth Circuit reviewed a judgment based, *inter alia,* on the Sherman Act in favor of six dairy farmers against a cooperative and its officers. Part of the proof in that case related to secret rebates given to certain customers by the cooperative in an attempt to make it appear as if the prices at which the cooperative was selling were higher. Among the contentions raised on appeal was the same argument as the court of appeals accepted here—*i.e.,* that there was no proof of any "conspiracy" to fix prices. Then Circuit Judge Blackmun, speaking for a unanimous panel, said (368 F.2d at 689, 690, emphasis added):

> [T]he rebate maneuver, under all the circumstance of this case, obviously supports a finding of conspiracy to fix wholesale as well as retail prices.
>
> * * * * *
>
> It is then argued that the inference of a conspiracy to control retail prices is not supported by the evidence. *Here, again, the very existence of the secret rebates in itself could be said to be the complete answer to this argument.*

The existence of the secret rebates established, on this record as well, a conspiracy between the agents of the Cooperative and their handler-customers to deprive the plaintiffs of the proper proceeds for their milk. The decision of the court of appeals to the contrary conflicted with the *Bergjans* decision and should be reversed by this Court.

2. The court of appeals ignored Rule 15(b) of the Federal Rules of Civil Procedure by reversing the jury's verdict in plaintiffs' favor because the facts, in its view, did not fit within the Pennsylvania definition of "conversion." The undisputed facts showed that the Cooperative had unlawfully kicked back to buyers of milk a certain portion of the minimum receipts which the plaintiffs were entitled to have. The jury squarely rejected the defense that the plaintiffs had not been harmed by this arrangement or that the total harm could be offset. Whether the defendants' conduct constituted "conversion" of money or of milk under Pennsylvania law, or whether the plaintiffs were entitled to the amount of the rebates because they had "a contract right to be paid by the Cooperative," or whether—as dissenting Judge Rosenn suggested—the agents of the Cooperative exceeded their authority, or

whether the handlers were unjustly enriched at the expense of the farmers, the fact remains that the farmers were deprived of money to which they were entitled. Rule 15(b) of the Federal Rules of Civil Procedure was designed to prevent the defeat of a proper claim simply because it was improvidently pleaded.

Numerous decisions of lower courts have applied Rule 15(b) to permit proper judgments to stand even though the legal theory initially pleaded did not squarely conform with the proof. *E.g., Mosley* v. *Dutton,* 367 F.2d 913 (5th Cir. 1966); *Arkla Exploration Co.* v. *Boren,* 411 F.2d 879 (8th Cir. 1969); *Hopkins* v. *Metcalf,* 435 F.2d 123 (10th Cir. 1970); *Marston* v. *American Employers Ins. Co.,* 439 F.2d 1035 (1st Cir. 1971); see generally 3 Moore, *Federal Practice* ¶ 15.13 [2] and authorities there cited. Indeed, conforming the theory of pleadings to the proof has been permitted under Rule 15(b) even when the correct theory is first raised in the court of appeals. *E.g., City of Green Cove Springs* v. *Donaldson,* 348 F.2d 197 (5th Cir. 1965); *Purified Down Prods. Corp.* v. *Travelers Fire Ins. Co.,* 278 F.2d 439 (2d Cir. 1960); *Cooper* v. *Anderson,* 277 F.2d 449 (5th Cir. 1960). The action of the court of appeals in this case was contrary to these decisions and should be reversed.

3. The court of appeals was simply in error in its understanding of Pennsylvania law regarding the tolling of the statute of limitations. Two recent decisions of the Pennsylvania Supreme Court clearly state that the "fraud" which must be shown to toll the statute is not limited to intentional deception but includes "unintentional deception." *Nesbitt* v. *Erie Coach Co.,* 416 Pa. 89, 204 A.2d 473, 476 (1964); *Walters* v. *Ditzler,* 424 Pa. 445, 227 A.2d 833 (1967). Moreover,

the facts in this record indicate that the federal standard of concealment, such as would be applied under section 4(b) of the Clayton Act, 15 U.S.C. § 15b was met. See, *e.g., Bailey* v. *Glover,* 88 U.S. 342, 348-350 (1875). For the rebates, in order to succeed, obviously had to be "self-concealing" so as not to run afoul of the Pennsylvania Milk Commission's rules.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.[6]

Respectfully submitted,

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[6] Although we have not included, among the Questions Presented, the correctness of the court of appeals' decision that the Cooperative's directors are not individually liable (pp. 20a-21a, *infra*), the directors would be proper defendants and answerable in damages under the Sherman Act claim and under the view expressed by dissenting Judge Rosenn. Accordingly, we believe they remain parties to any proceeding in this Court.